Filed 12/14/16 P. v. Newsom CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERT LUKE NEWSOM et al.,

Defendants and Appellants.

F071004

(Super. Ct. Nos. SF015290A & SF015290C)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant Gilbert Luke Newsom.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant Ryan Heath Cupelli.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Paul A. Bernardino, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

INTRODUCTION

This matter involves three defendants, Jacob Willard Lee, Ryan Heath Cupelli and Gilbert Luke Newsom[1] (collectively the Codefendants). A jury convicted both Cupelli and Newsom of second degree murder (Pen. Code, § 187, subd. (a);[2] count 1) for the death of Jerry Crook, an inmate at Wasco State Prison. In companion appeal F069985, we resolve an issue raised by Lee, who was convicted of voluntary manslaughter (§ 192, subd. (a)) for Crook's death.

In a bifurcated court proceeding, it was found true that Cupelli had a previous strike conviction and had a prior prison commitment. It was found true that Newsom had three prior prison commitments. Cupelli received a prison sentence of 30 years to life, plus a term of one year. Newsom received a prison sentence of 15 years to life, plus three consecutive terms of one year.

On appeal, both Cupelli and Newsom request that we examine the in camera review which the trial court conducted pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) for personnel records of two correctional officers involved in the investigation of Crook's death. Respondent does not object. Cupelli also argues the trial court abused its discretion in denying his pretrial motion for separate trials. We affirm.

FACTUAL BACKGROUND

The Codefendants did not present any evidence at trial. Below is a relevant summary of the prosecution's case.

On July 31, 2009, Jerry Crook, a new inmate at Wasco State Prison, was attacked by the Codefendants and severely beaten. Crook appeared weak and frail just prior to the attack. He had been coughing continuously during a new inmate briefing earlier that day,

---

1 The spelling of "Newsome" was used in both the clerk's and reporter's transcripts in the lower court. Via letter dated October 6, 2015, Newsom's appellate counsel advised this court that his client's name was misspelled in the Kern County Superior Court records.

2 All future statutory references are to the Penal Code unless otherwise noted.

and he seemed ill. After the attack, Crook slipped into a coma and remained in a vegetative state for a little over two months. The pathologist who performed the autopsy opined that the cause of death stemmed from complications following blunt force trauma to the head. Crook weighed 95 pounds at the time of his autopsy.

Two witnesses, both inmates, testified at trial about the details of the attack. Their testimony conflicted regarding whether Cupelli or Newsom delivered the blunt force trauma to Crook's head.

A. Testimony from Fredrick Marmelstein.

Fredrick Marmelstein was serving time at Wasco for burglary and a probation violation. He had convictions for identity theft in 2006, misdemeanor burglary and petty theft in 1999, and possession of bad checks in 1998. He told the jury he had remained out of trouble since his parole in 2009.

The Codefendants were inmates at Wasco when Crook was attacked. Marmelstein knew Lee as "Youngster," Cupelli as "Bam" or "Bam Bam," and Newsom as "Silver." Marmelstein's bunk was on the second tier of the housing unit. On the day of the attack, he observed the Codefendants sitting together at a table on the ground floor. They were drinking prison-made alcohol and they appeared very drunk. He observed Crook, a newly arriving inmate at Wasco, walking up some stairs to the second tier of cells. The Codefendants grouped together and ran up to the second tier. Lee pushed Crook down to the floor near Marmelstein's cell. Marmelstein jumped over Crook to get out of the way.

About 10 feet away, Marmelstein turned around and observed the attack. He saw Cupelli and Newsom hitting and kicking Crook. Lee did not participate further in the attack. Crook rolled into a ball and tried to get between bunk beds. He kept asking what had he done, saying he did not know his attackers.

According to Marmelstein, Cupelli used the bunk beds to lift himself up before slamming both feet down onto Crook's head. Marmelstein heard Crook's head hit the concrete floor, and he stopped calling out. Cupelli jumped on Crook's head and body

over five more times, and Crook stopped moving. In the meantime, Newsom was kicking and hitting Crook, including his head. Marmelstein heard Cupelli say, "[L]et's get out of here." Newsom kicked Crook a few more times, including his head. Cupelli "bear hugged" Newsom, lifting him away from Crook. Cupelli ran to his bunk area on the second tier. Cupelli took off his shirt and threw it on the floor before getting into his bunk bed. Newsom went to a common toilet and Marmelstein saw Newsom wiping blood off of himself. Marmelstein estimated the attack lasted about two minutes.

Correctional officers responded and the facility was placed on lockdown. Inmates were taken out into the yard. In the yard, Marmelstein heard Cupelli say, "[W]e kicked his ass."[3] After the attack, Marmelstein's mattress and belongings had blood on them. Lee later came to him, apologized, and gave him some shower shoes and a mattress.

B. Testimony from Daniel VanBenthuysen.

Daniel VanBenthuysen was serving time at Wasco for a parole violation for using drugs. He had convictions for a 1999 second degree burglary and a 2004 forgery. Before the attack, he observed the Codefendants sitting together playing cards. They had been drinking and they appeared drunk. VanBenthuysen saw a group of new arrivals going up the stairs with bags on their backs. He saw the Codefendants attack Crook on the second tier. VanBenthuysen was about eight to 10 bunks away from the attack. He described Crook as a "shorter, older gentleman." He heard Crook say, "I don't even know you guys." According to VanBenthuysen, Cupelli and Lee stopped the attack after about 10 seconds but Newsom continued to strike Crook. Newsom "[k]ept kicking him and stomping him and just, yeah, beating him. And it went on for like a really long time." Cupelli returned and pulled Newsom off of Crook. At that time, Crook was between two

[3] The trial court instructed the jury to consider this statement only as to Cupelli, and not to either Newsom or Lee.

bunk beds, and Newsom was "stomping" Crook's head. Afterwards, Newsom went to the bathroom.

During his initial statements to correctional officers, VanBenthuysen did not mention Cupelli's or Lee's involvement in the attack. He did not believe Cupelli or Lee were seriously involved and they were not responsible for what happened. He believed the attack lasted about two minutes.

C. Testimony from correctional officers.

Aunter Haddad was working as a correctional officer at Wasco on the day of this incident. He heard a disturbance and looked outside his office. He observed several inmates looking in one direction. The building, which was normally quite loud, became silent. Haddad saw Cupelli rushing back to his cell. Cupelli took off his shirt and threw it on the ground. Cupelli's hands "appeared to be very shaky." As he ran to the scene of the incident, Haddad saw Newsom in a restroom in a crouched position.

Correctional officers secured the facility and medical personnel attended to Crook, who was lying unresponsive face down in a large pool of blood. Blood had spattered onto the ceiling above him. All of the inmates in the facility were stripped and searched. No inmates were found with injuries or weapons.

Roger Cook worked at Wasco in the investigative services unit. He observed some inmates in holding cells following the attack. He heard Newsom say, "I'm responsible. I'm responsible." Cook then interviewed Newsom, which was recorded and played for the jury. When Newsom was informed he was being charged with attempted murder, he said, "Right on." Cook noted at trial that Newsom had appeared intoxicated, with slurred speech, red, watery eyes, and an unsteady gait. Newsom, however, seemed to understand Cook's questions and he answered everything correctly.

D. Forensic evidence.

DNA blood swabs were collected from Newsom's left ring finger, left knee, left foot, and his cell blanket. Blood swabs were collected from Cupelli's clothes. The DNA

obtained from Newsom's left knee was a single source profile that matched Crook's DNA. The DNA obtained from Newsom's left ring finger, cell blanket and left foot was a mixture from two people: Newsom was a major contributor and Crook's DNA could not be excluded as a minor contributor. Cupelli and Lee were excluded. The DNA obtained from Cupelli's clothes was also a mixture from two people: Crook's DNA could be a possible contributor to a major portion of this mixture and Cupelli could not be excluded as a minor contributor.

DISCUSSION

I. The Trial Court Properly Conducted The In Camera *Pitchess* Review.

Both Cupelli and Newsom request that we independently review the in camera *Pitchess* hearing the trial court conducted to determine whether discoverable materials existed. Respondent does not object.

A. Background.

Prior to trial, Newsom filed a *Pitchess* motion pursuant to Evidence Code section 1043 seeking information about complaints filed with the California Department of Corrections (CDC) about correctional officers Roger Cook and Carlos Medina.[4] Newsom requested information about persons who had filed complaints involving Cook and/or Medina for acts indicating dishonesty, false arrest, illegal detention, use of excessive or unwarranted force, and/or fabrication of charges, evidence or reports. Cupelli formally joined Newsom's *Pitchess* motion. The trial court granted Newsom's motion and conducted an in camera review on February 16, 2011.

A court reporter was present during the closed hearing. Two custodians of records for the CDC were sworn prior to testifying. Both custodians stated they had reviewed Newsom's *Pitchess* motion and had searched for potentially responsive records. The

---

[4] Medina, a correctional officer at Wasco State Prison, collected DNA swabs following the assault on Crook.

custodians testified that no responsive records were located for Medina. One complaint was located involving Cook, which was provided to the court for review. This was described as "a staff complaint that was filed by an inmate Williams regarding orders given for use of force." At the conclusion of the in camera review, the court determined no discoverable information existed.

In June 2015, copies of Cook's and Medina's personnel files were sealed and filed with this court. Accompanying those records were two declarations under penalty of perjury from custodians of records for the CDC. The declarations indicated Cook's and Medina's personnel files appeared as they existed on February 16, 2011. Included with those records was a copy of a staff complaint "which may have been reviewed by the court at the time of the *Pitchess* Motion[.]"

On June 9, 2015, the judge who presided over the *Pitchess* hearing executed a Confidential Settled Statement which was filed with this court that same month. The judge stated that the files received from the CDC were the same files which the court examined, in camera, on February 16, 2011. According to the declaration, no additional files were examined.

B. Standard of review.

"'A criminal defendant has a limited right to discovery of a peace officer's personnel records. [Citation.] Peace officer personnel records are confidential and can only be discovered pursuant to Evidence Code sections 1043 and 1045.' [Citation.]" (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 180 (*Yearwood*).) "A defendant is entitled to discovery of relevant information from the confidential records upon a showing of good cause, which exists 'when the defendant shows both "'materiality' to the subject matter of the pending litigation and a 'reasonable belief' that the agency has the type of information sought." [Citation.]' [Citation.]" (*Id.* at p. 180.)

When the court finds good cause and conducts an in camera review pursuant to *Pitchess*, it must make a record that will permit future appellate review. (*People v. Mooc*

(2001) 26 Cal.4th 1216, 1229–1230 (*Mooc*).) A custodian is not required to present to the trial court any documents that are "clearly irrelevant" to the *Pitchess* motion. (*Mooc, supra,* at p. 1229.) However, if the custodian has any doubt, those documents should be presented to the trial court. (*Ibid.*) "The custodian should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion." (*Ibid.*) A court reporter should memorialize the custodian's statements and any questions asked by the trial court. (*Ibid.*)

C. Analysis.

We have reviewed the trial court's in camera examination of Cook's and Medina's personnel files. The trial court complied with the procedural requirements of a *Pitchess* hearing. A court reporter was present and the custodians were sworn prior to testifying. (*Yearwood, supra,* 213 Cal.App.4th at p. 180.) Although the custodians did not present any documents involving Medina for the in camera review, the custodians testified that no relevant records existed. This was permissible. (*Mooc, supra,* 26 Cal.4th at p. 1229.)

We have reviewed the sealed personnel files for both Cook and Medina. Nothing in these records was subject to disclosure under *Pitchess*. The "staff complaint" involving Cook did not fall under this *Pitchess* motion as it did not involve Cook's actions indicating dishonesty, false arrest, illegal detention, use of excessive or unwarranted force, and/or fabrication of charges, evidence or reports. The superior court did not abuse its discretion in declining to disclose any records.

II. The Trial Court Did Not Abuse Its Discretion In Denying The Motion For Separate Trials.

Cupelli argues the trial court abused its discretion in denying his pretrial motion for separate trials. He contends he was deprived of his state and federal constitutional rights to due process, a fair trial, and the right to present a complete defense. He asserts

reversal is required due to alleged prejudice. Without addressing this issue specifically, Newsom's appellate brief contains a statement of joinder to "any and all issues" raised by Cupelli on appeal.

A. Background.

1. Pretrial motion for severance.

Prior to trial, Cupelli filed a motion for separate trials. At the hearing, Cupelli's defense counsel emphasized the conflicting evidence regarding the scope of Cupelli's involvement in Crook's attack. He contended a conflict would occur regarding how the battery of Crook resulted in alleged manslaughter or murder. He asserted joinder would prevent introduction of certain inculpatory statements Newsom made after the attack.[5]

In ruling on the motion, the trial court relied primarily on *People v. Souza* (2012) 54 Cal.4th 90 (*Souza*). The court determined there was sufficient independent evidence, based on the prosecution's offer of proof, that a conflict alone did not demonstrate Cupelli's guilt. The court did not find that antagonistic defenses existed. It denied the motion after stating it considered all of the issues and exercised its discretion.

2. Evidence of Newsom with a piece of metal.

During the trial, Cupelli requested a hearing pursuant to Evidence Code section 402 regarding some proposed trial testimony from VanBenthuysen. At the section 402 hearing, VanBenthuysen confirmed he did not see Newsom with a weapon during Crook's assault, but he had observed Newsom with a piece of metal about a week before the attack. During a statement to Wasco investigators, VanBenthuysen had said he had seen Newsom sharpening a piece of metal before Crook's attack. At the section 402

---

5 Following Crook's attack, it was alleged Newsom said, "Hey, homie, don't worry, I got this one, I will take the ride for this one alone," or words similar in nature. When these statements were made, Cupelli was nearby. The trial court precluded admission of these statements at trial.

hearing, VanBenthuysen said he made that statement because he assumed Newsom was going to sharpen the metal, but he denied ever seeing Newsom sharpening it.

Cupelli's counsel argued he was entitled to impeach VanBenthuysen with his inconsistent statements, contending this would show a lack of specific intent to commit murder because no weapon was used in the attack. Counsel for Lee and Newsom objected, and the trial court excluded this evidence. The court determined the prejudice to the other defendants substantially outweighed its probative value.

3. Evidence of motive and motion for a mistrial.

After the prosecution presented its case in chief, and before the Codefendants rested on the state of the evidence, Cupelli's defense counsel sought leave to call either VanBenthuysen or Marmelstein to establish a motive for the attack on Crook. An offer of proof was made that VanBenthuysen and/or Marmelstein would testify that they heard Crook was a snitch and had snitched on one of Lee's family members. If admitted, the defense would argue the attack was done not to kill Crook, but to get him transferred away. Cupelli's counsel was prepared to call an expert who would opine on the prevalence of inmate-manufactured weapons in prison.[6]

Counsel for Lee and Newsom were opposed to this evidence primarily over a concern it could assist the prosecution in establishing malice aforethought, premeditation and deliberation. The trial court denied Cupelli's motion to introduce this evidence. The court found nothing to confirm that any of the Codefendants had a belief Crook was a snitch. The proffered evidence was unduly speculative. In addition, the probative value was substantially outweighed by the probability this evidence was unduly prejudicial, it would cause confusion, mislead the jury, and consume too much time.

---

6 During opening statements, Cupelli's defense counsel stated a prison expert would testify about prison life, including the many weapons which are seized every year, making it possible to commit murder in prison.

Following the denial, Cupelli's counsel sought a motion for mistrial. He argued the Codefendants could not receive a fair trial together, and Cupelli's defense could not be presented. Counsel noted a motion for severance had been previously sought and denied. The trial court denied the motion for mistrial, stating it did not find a denial of a fair trial or a miscarriage of justice. The Codefendants then rested and presented no evidence at trial.

4. Relevant jury instructions.

With CALJIC No. 3.00, the jury was instructed on aiding and abetting. The term "principals" was defined as those persons who commit a crime, including those who aid and abet. "When the crime charged is murder, the aider and abettor's guilt is determined by the combined acts of all the participants as well as that person's own mental state. If the aider and abettor's mental state is more culpable than that of the actual perpetrator, that person's guilt may be greater than that of the actual perpetrator. Similarly, the aider and abettor's guilt may be less than the perpetrator's if the aider and abettor has a less culpable mental state."

The jury was instructed, in part, that a person aids and abets a crime if he (1) had knowledge of the perpetrator's unlawful purpose, (2) had the intent or purpose of committing, encouraging or facilitating commission of the crime, and (3) acted to aid, promote, encourage, or instigate the crime's commission.

With CALJIC No. 3.02, the jury was instructed that one who aids and abets is not only guilty of that crime, but also guilty of any other crime committed by a principal which is a natural and probable consequence of the original crime. To find a defendant guilty of murder under this theory, it must be beyond a reasonable doubt that (1) battery was committed; (2) the defendant aided and abetted in battery; (3) a co-principal in that crime committed murder; and (4) the murder was a natural and probable consequence of the battery. An objective test is used to determine whether a consequence is natural and probable, which is based on what a person of reasonable and ordinary prudence would

have expected was likely to occur. All of the circumstances surrounding the incident should be examined.

A "natural consequence" is "within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. [¶] 'Probable' means likely to happen."

5. Relevant closing arguments.

During Cupelli's closing arguments, his counsel generally urged the jury to find VanBenthuysen's version of events more believable, contending that Cupelli was not substantially involved in the attack, and it was Cupelli who pulled Newsom off Crook to stop the attack. While in custody, Newsom said he was responsible. Cupelli did not aid and abet because he left the attack, and it was not foreseeable Crook's death would occur at that point.

During Newsom's closing arguments, his counsel generally urged the jury to find Marmelstein's version of events more believable, contending it was Cupelli who stomped on Crook's head and delivered the fatal blows. Newsom was intoxicated, as evidenced by his actions and statements in the recorded interview with Cook.

During closing arguments, Newsom's counsel stated he believed Newsom was not guilty. Cupelli's counsel objected and sought a mistrial. Cupelli also made a motion to reopen evidence, arguing Newsom's counsel had read statements to the jury which were never placed into evidence but which Marmelstein had made previously to investigating officers. Cupelli's counsel asserted Newsom's rights had trumped Cupelli's rights throughout the trial, renewing his concern that Newsom's "shank" should have been introduced into evidence to support Cupelli's defense.

The trial court indicated it had admonished the jury several times, based on counsel's objections, that the attorneys' comments were not evidence. The jurors were told to rely upon their own recollections and notes in confirming the evidence, and they should ignore the attorneys if the evidence was misstated. After hearing argument from

all parties, the trial court denied the motion for mistrial. The court did not find that Newsom's counsel had willfully misstated the evidence to the point of creating a miscarriage of justice or denying Cupelli a fair trial. The trial court also denied the motion to reopen the evidence.

Although the court declined to declare a mistrial, it decided to allow limited rebuttal argument only among the Codefendants. Each defense counsel was allowed to respond to the closing arguments made by the other defense attorneys.

Newsom's counsel continued his closing arguments. He later stated, "I know [Newsom] is not guilty of first degree murder -- or second degree murder for that matter. It's not even close. How could you find a drunken man, because he kicked -- he unlawfully kicked [Crook]? As it happens, [Cupelli] went overboard. He went crazy. He killed him. You are going to find [Newsom] guilty for what [Cupelli] did?"

The trial court sustained an objection by Cupelli's counsel. The jury was directed to disregard any personal opinion expressed by counsel regarding guilt or innocence, and to base its decision on the evidence and the law.

B. Standard of review.

A court's denial of a motion for severance is reviewed for abuse of discretion, and it is judged on the facts as they appeared at the time of the ruling. (*People v. Montes* (2014) 58 Cal.4th 809, 834.) A ruling that was correct when made may nevertheless be set aside if joinder created a trial that was grossly unfair, violating due process. (*Id.* at pp. 834–835.)

C. Analysis.

Cupelli raises numerous arguments to establish either an abuse of discretion or a grossly unfair trial. He asserts "mutual antagonism" between the defenses "presented an irreconcilable conflict." He claims that Newsom presented a mutually exclusive defense which precluded his acquittal or at least consideration of a lesser degree of culpability.

He contends he was precluded from introducing evidence that (1) VanBenthuysen and/or Marmelstein heard that Crook was a snitch; (2) Marmelstein saw Newsom cutting and sharpening a piece of metal normally used for a prison-manufactured weapon; (3) inmate manufactured weapons are prevalent in prison and used to resolve prison politics; and (4) Newsom had a violent nature and a violent past. He maintains this missing evidence would have inferred it was Newsom who inflicted the fatal blows, and a severed trial would have added weight to VanBenthuysen's version of events.

Cupelli also contends Newsom's counsel acted as a "second prosecutor" who attacked Cupelli and engaged in improper cross-examination of Marmelstein designed to emphasize that Cupelli was responsible for Crook's death. He claims the jury was "inundated" with the prosecution's theory because joint trials were not ordered. He notes that Newsom's counsel read into the record a transcript of Marmelstein's prior statements to investigators which highlighted Cupelli's actions. He suggests Newsom's counsel acted analogous to prosecutorial misconduct, requiring the trial court to intervene, and Newsom's counsel opined during closing arguments that he believed Newsom was not guilty even after being admonished not to do so. He maintains these tactics were meant to inflame the jury against him, causing a violation of due process. We find Cupelli's numerous contentions to be without merit.

A statutory preference exists for joint trials. (*People v. Homick* (2012) 55 Cal.4th 816, 848.) A joint trial is required when multiple defendants are jointly charged unless the court orders separate trials. (§ 1098.) As the rule, a trial court must order a joint trial pursuant to section 1098 and it is the exception to grant separate trials. (*People v. Cleveland* (2004) 32 Cal.4th 704, 726.)

"Separate trials may be necessary if a codefendant has made an incriminating confession, association with codefendants may be prejudicial, evidence on multiple counts may cause confusion, there may be conflicting defenses, or a codefendant may give exonerating testimony at a separate trial." (*People v. Cleveland*, *supra*, 32 Cal.4th at

p. 726.) However, conflicting defenses alone do not mandate severance. (*Ibid*.) Otherwise, the legislative preference for joint trials would be negated and separate trials would be required in almost every case due to conflicting or antagonistic defenses. (*People v. Hardy* (1992) 2 Cal.4th 86, 168 (*Hardy*).)

A conflict from antagonistic defenses merits severance "only where the acceptance of one party's defense precludes the other party's acquittal. [Citations.]" (*People v. Carasi* (2008) 44 Cal.4th 1263, 1296.) Antagonistic defenses do not compel severance when sufficient independent evidence exists against the moving defendant because it is not the conflict alone that demonstrates guilt. (*Id.* at p. 1298.) Two Supreme Court opinions are instructive.

In *Hardy, supra,* 2 Cal.4th 86, two defendants (Hardy and Reilly) were convicted of two counts of first degree murder and one count of conspiracy, while Reilly was also found guilty of soliciting the murders. (*Id.* at p. 117.) A third defendant, Morgan, was tried jointly with Hardy and Reilly. (*Id*. at p. 128.) Prior to trial, all three defendants moved to sever their respective trials. The trial court held in camera hearings separately with each defense counsel to learn of the expected defense theories. The trial court learned the following: (1) Reilly's counsel would argue that Reilly withdrew from the conspiracy; (2) Hardy's counsel would argue Hardy was not present at the crime scene, did not participate in the conspiracy, and Reilly and Morgan must have committed the murders; and (3) Morgan's counsel would argue Reilly and some unknown third person killed the victims in order to blackmail Morgan. (*Id.* at pp. 167–168.)

On appeal, the Supreme Court held this was a "'classic case'" for a joint trial because of the common events and victims. (*Hardy, supra,* 2 Cal.4th at p. 168.) Although the expected defenses were in conflict because all three defendants denied culpability while speculating one or both of the other defendants were responsible, the conflicting defenses were not "antagonistic" because they were not necessarily fatal to any other defense. (*Id.* at pp. 168–169.) A consolidated trial provided realistic benefits

because much of the evidence in the joint trial largely mirrored the evidence in separate trials. (*Id.* at p. 169.) The potential for jury confusion was low. Each defendant presented a theory that absolved himself of guilt while focusing blame on the others. The jury was presented with a "straightforward choice" regarding credibility. (*Ibid.*) No defendant confessed and implicated another defendant, and no defendant presented a defense that necessarily implicated another defendant. *Hardy* determined that the trial court did not abuse its discretion by denying Reilly's severance motion. (*Ibid.*) *Hardy* further rejected a claim that the joint trial violated Reilly's rights to due process and a fair trial. The Supreme Court determined most of the evidence was admissible against all three defendants because of the conspiracy charge, and any other evidence otherwise inadmissible as to Reilly was not prejudicial to his case. (*Id.* at p. 170.)

In *Souza, supra,* 54 Cal.4th 90, three men armed with guns, two of whom were brothers, opened fire on partygoers at a house party. Five people were shot and three of the victims died. Trial occurred for the two brothers while the third man was neither apprehended nor identified. (*Id.* at p. 96, fn. 2.) One brother, Matthew, filed a motion to sever his trial, contending a joint trial would be unfair because antagonistic defenses would likely be presented. The identity of the shooter who fired the fatal shots was disputed from conflicting eyewitness accounts and physical evidence. Matthew also contended severance was required because of incriminating out-of-court statements his brother, Michael, made that the prosecution might offer into evidence at trial. The trial court granted a motion in limine to exclude Michael's out-of-court statements, but denied the motion to sever trials. (*Id.* at p. 108.)

On appeal, our Supreme Court concluded the trial court did not abuse its discretion in denying the motion for severance. The charges against the brothers involved common crimes, events and victims, making it a classic case for a joint trial. (*Souza, supra,* 54 Cal.4th at p. 110.) The *Souza* court rejected an argument that prejudice occurred because the brothers both contended the other fired the fatal shots. (*Ibid.*) Despite the conflicting

nature of the eyewitness testimony and the physical evidence, Matthew's guilt was not demonstrated by the conflict created from the differing defenses. The prosecution presented independent evidence showing Matthew's participation in the events that night. Circumstantial evidence showed Matthew fired the fatal shots, and Michael's defense was not dispositive because none of the surviving witnesses directly saw how each victim was shot. (*Id.* at pp. 111–112.) *Souza* determined there was no danger of jury confusion or prejudicial association. Neither brother testified at trial. There was no suggestion Michael would have provided testimony exonerating Matthew if separate trials occurred. Because the trial court granted the motion in limine to exclude Michael's out-of-court statements, there was no issue regarding extrajudicial statements in which a codefendant implicated a defendant. "Finally, no evidence was presented at the joint trial that would not have been presented at a separate trial." (*Id.* at p. 112.) *Souza* held the joint trial did not result in gross unfairness under these circumstances. (*Ibid.*)

Here, as in *Hardy* and *Souza*, the charges against Cupelli and Newsom were identical, involving the same event and victim. This was a classic case for a joint trial. The prosecution presented independent evidence establishing Cupelli's participation in this crime and his guilt. Cupelli's guilt was not demonstrated by the conflict created from Newsom's defense. This record does not establish a danger of jury confusion or prejudicial association.

A consolidated trial provided realistic benefits because much of the evidence in the joint trial largely mirrored the evidence that would have occurred in separate trials. No defendant confessed and implicated another defendant. There is no suggestion Newsom or Lee would have provided testimony exonerating Cupelli if separate trials had occurred. There was no issue regarding extrajudicial statements in which another defendant implicated Cupelli. Similar to *Hardy* and *Souza*, we cannot say that the trial court abused its discretion in denying severance or that the joint trial resulted in gross unfairness.

Different witnesses described Crook as an "older gentlemen" and ill. He weighed 95 pounds at the time of his autopsy. The evidence strongly suggests Crook was extremely weak and frail when this crime occurred. His attackers, however, were relatively young and weighed considerably more. Photographs of the Codefendants were admitted into evidence, which generally depicted their respective appearances on the day of this crime. Based on the probation reports, Lee was born in 1988, is five feet 11 inches tall and weighed approximately 195 pounds. Cupelli was born in 1984, is five feet nine inches tall and weighed approximately 180 pounds. Newsom was born in 1980, is five feet seven inches tall and weighed approximately 200 pounds.

Before the attack, the Codefendants were seen sitting together. As Crook walked up a flight of stairs, the Codefendants gathered and went to the second tier. Lee pushed Crook to the cement floor whereupon Cupelli and Newsom attacked him. Marmelstein, the closer witness to the attack, testified that Lee pushed Crook down, Cupelli repeatedly stomped on Crook's head, and Newsom hit and kicked Crook, including blows to his head. In stark contrast, VanBenthuysen said both Lee and Cupelli were only involved for the first 10 seconds of the attack, which lasted about two minutes. After the attack, Marmelstein heard Cupelli say, "[W]e kicked his ass."

Similar to *Hardy*, although Newsom blamed Cupelli, the conflicting defenses were not "antagonistic" because they were not necessarily fatal to another person's defense. To the contrary, the jury was required to make credibility determinations regarding the conflicting testimony as to the scope of each Codefendant's involvement.

During deliberations, the jury requested, and received, a complete read back of Marmelstein's testimony. Cupelli contends this shows the jury "struggled" with this evidence. However, the jury reached a verdict later that same day, finding both Cupelli and Newsom guilty of second degree murder while determining Lee committed voluntary manslaughter. Based on the verdicts rendered, it can be inferred the jury found Marmelstein's testimony credible. Marmelstein's testimony established that Cupelli

committed second degree murder. The evidence omitted from the joint trial would not have altered how the jury viewed Cupelli's involvement in Crook's death.

With CALJIC No. 3.00, the jury was instructed that an aider and abettor's guilt is determined by the combined acts of all the participants as well as that person's own mental state. The jury was told that an aider and abettor's guilt may be more or less than the perpetrator's depending on the aider and abettor's mental state. It can be inferred from Cupelli's actions that he knew of the plan to beat Crook, and his concerted action with Lee and Newsom reasonably implies a common purpose and intent. The target crime of battery rendered Crook unconscious, put him into a vegetative state, and he died. Under the circumstances of this crime, Crook's death was a natural and probable consequence of the battery which Cupelli aided and abetted.

Based on this record, the joint trial was not grossly unfair. It is beyond a reasonable doubt Cupelli would not have obtained a more favorable result in a separate trial. Accordingly, this claim fails.

DISPOSITION

The judgment is affirmed.

_____
LEVY, Acting P.J.

WE CONCUR:

_____
GOMES, J.

_____
KANE, J.